In the

Supreme Court of the United States

October Term, 1977

No. 77-950

COLLECTION CONSULTANTS, INC.
AND STELLA THORNTON,

Appellants,

v.

THE STATE OF TEXAS,

Appellee.

On Appeal from the
Court of Criminal Appeals of Texas

REPLY TO MOTION TO DISMISS OR AFFIRM

ROBERT B. COUSINS, IV
3100 First National Bank
Building,
Dallas, Texas 75202,
Attorney for Appellants.

Of Counsel:

Ivan Irwin, Jr.
3100 First National
Bank Building
Dallas, Texas 75202

James E. Sutton
2819 North Fitzhugh
Dallas, Texas 75221

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The Appellants, COLLECTION CONSULTANTS, INC., and STELLA THORNTON, respectfully submit the following as their Reply to the Motion to Dismiss or Affirm filed by the State of Texas.

INTRODUCTION

The sole issue presented by this appeal is whether Tex. Penal Code Ann. § 42.07(a)(2) (1974)[1], which prohibits speech that allegedly annoys or alarms another person,

[1] This Provision states:

§ 42.07 Harassment.

(a) a person commits an offense if he intentionally:

(2) threatens, by telephone or in writing, to take unlawful action against any person and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient or intends to alarm or annoy the recipient; (4 V.T.C.A. Penal Code, pp. 167-168.)

violates the First and Fourteenth Amendments to the Constitution of the United States. In the Jurisdictional Statement, the Appellants demonstrated that since fundamental rights of free speech are infringed upon by Tex. Penal Code Ann. § 42.07(a)(2) (1974), this issue is a substantial federal question which should be the subject of review by this Court.

The defense of Tex. Penal Code Ann. § 42.07(a)(2) (1974) by the State of Texas is based upon the judicial construction within Texas of a similar statute which was a part of the former Texas Penal Code, and upon the State's interpretations of this Court's First Amendment decisions. In this reply, the Appellants demonstrate that the contentions articulated in the Motion to Dismiss or Affirm are misconstructions of the determinative constitutional principles involved in this appeal.

ARGUMENT

The precursor statute, Article 476, provided criminal sanctions for using a telephone "in any manner with intent to harass, annoy, torment, abuse, threaten or intimidate another." Unlike Tex. Penal Code Ann. § 42.07(a)(2) (1974), the former statute also contained an exception for telephone calls placed for a lawful business purpose. In *Alobaida v. State*, 433 S.W. 2d 440 (Tex. Crim. App.) *cert. denied*, 393 U.S. 943 (1968), this former statute was challenged on the grounds that the exception violated the Equal Protection Clause of the Fourteenth Amendment. The Court of Criminal Appeals of Texas rejected this argument ruling that the exception was reasonable since it was not designed to apply to any particular class of persons. The challenge which the Appellants have lodged against Tex. Penal Code Ann. § 42.07(a)(2) (1974) — the vagueness and overbreadth of the statute — was not considered in *Alobaida, supra*, and the decision is of no value to this Court. Even less authority is provided by the other Texas cases cited by the State. *LeBlanc v. State*, 441 S.W. 2d 847 (Tex. Crim. App. 1969) and *Schuster v. State*, 450 S.W. 2d 616 (Tex. Crim. App. 1970). The Court summarily affirmed *Alobaida, supra*, in each of these decisions and the opinions contain absolutely no discussion of the constitutional issues involved.

In its Motion to Dismiss or Affirm, the State of Texas misconstrues a leading First Amendment case, *Coates v. City of Cincinnati*, 402 U.S. 661 (1971). As discussed at length in the Jurisdictional Statement, *Coates* requires precision in the definition of a criminal offense. The State of Texas contends that Tex. Penal Code Ann. § 42.07(a)(2) (1974) provides an ascertainable standard of guilt because "the statute is plainly directed not to any First Amendment telephone conversation which the listener finds annoying or alarming, but to those communications which threaten to take unlawful action against the recipient thereby annoying or alarming the listener." (Motion to Dismiss or Affirm at p. 6). This statement is a gross oversimplification of the dilemma in which the Appellants were placed by Tex. Penal Code Ann. § 42.07(a)(2) (1974).

The unlawful act which the Appellants allegedly threatened to take, thereby violating Tex. Penal Code Ann. § 42.07(a)(2) (1974), was to commit the offense of harassment by telephone. This offense is defined by Tex. Rev. Civ. Stat. Ann. art. 5069-11.03 (Supp. 1974), which states:

> Art. 5069-11.03. Harassment; Abuse.
>
> In connection with the collection of or an attempt to collect any debt alleged to be due and owing by a consumer, no debt collector may oppress, harass, or abuse

any person by methods which employ the following practices:

> . . . (d) causing a telephone to ring repeatedly or continuously or making repeated and continuous telephone calls with the willful intent to harass any person at the called number.

To determine whether their conduct was violative of Tex. Penal Code Ann. § 42.07(a)(2) (1974), the Appellants had to first ascertain whether their conduct amounted to harassment within the meaning of Article 5067, and then further ascertain whether such conduct annoyed or alarmed the recipient of the call. These judgments had to be made in a vacuum since Texas law does not define the words "harass", "annoy", or "alarm". It was just this type of dilemma which offended this Court in *Coates v. City of Cincinnati, supra.*

Finally, the Motion to Dismiss or Affirm concedes that Tex. Penal Code Ann. § 42.07(a)(2) (1974) delegates to the recipient of a telephone call the decision of when such a verbal communication is outside the protection of the First Amendment. The State argues that such a situation is no different than statutes which define obscenity with reference to the viewer's perceptions. This Court, however, has consistently held that such statutes are only constitutional when they meet certain objective standards. See *Miller v. California*, 413 U.S. 15 (1973). Tex. Penal Code Ann. § 42.07(a)(2) (1974) provides no objective standards and results in the regulation of speech by the subjective impressions of a prosecuting witness in a way that allows arbitrary and erratic enforcement. Such imprecise standards are not adequate to protect a citizen's fundamental right to freedom of speech. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

CONCLUSION

Wherefore, for the foregoing reasons and for the reasons set forth in the Jurisdictional Statement, the Appellants respectfully pray for an order of this Court noting probable jurisdiction to review the judgment and opinion of the Court of Criminal Appeals of Texas.

Respectfully submitted,

/s/ ROBERT B. COUSINS, IV

ROBERT B. COUSINS, IV
3100 First National Bank Building,
Dallas, Texas 75202,
(214) 748-9696

Attorney for Appellants.

Of Counsel:

Ivan Irwin, Jr.
3100 First National Bank Building
Dallas, Texas 75202

James E. Sutton
2819 North Fitzhugh
Dallas, Texas 75221

PROOF OF SERVICE

I, Robert B. Cousins, IV, attorney for COLLECTION CONSULTANTS, INC. and STELLA THORNTON, Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of May, 1978, I served three (3) copies of the foregoing Reply to Motion to Dismiss or Affirm on the party to this proceeding required to be served by depositing the same in a United States mailbox, with first class postage pre-paid, at the following post office address:

Ms. Catherine E. Greene
Assistant Attorney General
P. O. Box 12548,
Capitol Station
Austin, Texas 78711

/s/ ROBERT B. COUSINS, IV

ROBERT B. COUSINS, IV,
3100 First National Bank
Building,
Dallas, Texas 75202,
(214) 748-9696

Attorney for Appellants.